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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1976

No. 75-1069

RICHMOND UNIFIED SCHOOL DISTRICT, RICHMOND BOARD OF EDUCATION, and W. W. SNODGRASS,
Petitioners,

vs.

SONJA LYNN BERG, individually and on behalf of all other similarly situated female employees of the Richmond Unified School District,
Respondent,

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT

MARY C. DUNLAP,
EQUAL RIGHTS ADVOCATES, INC.,
433 Turk Street,
San Francisco, California 94102.
Telephone: (415) 441-2618.
Attorneys for Respondent.

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BRIEF FOR THE RESPONDENT

QUESTIONS PRESENTED

I. Did the Court of Appeals err in its determination that the District Court had jurisdiction of the subject matter of respondent's Title VII claims?

II. Consistent with Title VII's prohibition against sex-based discrimination in employment, may an employer classify its pregnant employees as disabled for purposes of ordering extraordinary physical examinations and imposing compulsory leave dates, while it classifies these same persons as not disabled for the purpose of refusing to pay them accumulated sick leave earnings?

III. Does this Court's decision in *General Electric Company v. Gilbert* permit employers to discriminate against women on account of pregnancy?

STATEMENT OF THE CASE

As of November 15, 1972, respondent Mrs. Berg was a pregnant schoolteacher, employed by petitioner Richmond Unified School District (hereinafter, the "School District") (A. 109). The School District then had and enforced a written policy that required every permanent certificated employee, such as Mrs. Berg, to commence "maternity leave" no later than the first day of the seventh month of her pregnancy. (A. 36). Simultaneously, the School District had and enforced an unwritten policy that foreclosed a pregnant employee from receiving accumulated sick leave compensation for days of actual disability due to pregnancy. (A. 8, 88). The alleged sex-discriminatory nature and effect of those policies was the subject of an E.E.O.C. charge signed by Mrs. Berg on November 15, 1972, and received by the E.E.O.C. on November 17, 1972. (A. 109).

On November 29, 1972, the petitioner Richmond Board of Education (hereinafter, the "Board") convened, and held a discussion concerning the School District's compulsory maternity leave policy. Petitioner Superintendent W. W. Snodgrass (hereinafter, the "Superintendent") observed that

> ". . . several court cases across the United States have concluded that determination of the starting date for maternity leave is a matter to be determined between the employee and her physician . . ."
>
> (A. 17).

While the Superintendent noted that "[s]ome California school districts have adopted such a policy" (A. 17), the Superintendent recommended to the Board that it retain the seventh month leave policy, and adopt an "interim" policy requiring every pregnant employee who wished to work beyond the start of the seventh month to seek an extension from District officials (A. 17-18). The Assistant Superintendent of Personnel, Mr. Teese, stated that:

> "[t]he basic reason behind the beginning of maternity leave at the start of the seventh month . . . was to protect school districts from lawsuits that might evolve from injuries to teachers . . ."
>
> (A. 18).

Next petitioner the Superintendent observed that:

> ". . . only in recent months had teachers objected to the present requirements because of the publicity given to court cases . . ."
>
> (A. 19-20),

and he reported that the sole motivation for the proposed "interim" policy was "litigation". (A. 20).

At a meeting of the Board on December 13, 1972, the proposed "interim" policy was adopted, requiring every pregnant employee who was medically advised by her own physician that she could continue to work beyond the compulsory leave date of the District to apply to District officials for treatment as an "exception" to its mandatory leave policy (A. 21-24). Implementation of the policy was left to Assistant Superintendent Mr. Teese, who rejected Mrs. Berg's request that she be permitted to follow the advice of her own physician that she could continue working until the date of her delivery, by a letter dated December 27, 1972 requiring Mrs. Berg to submit to an examination by a District-selected physician (A. 28) and warning Mrs. Berg that:

> ". . . [s]hould a District physician recommend the extension of leave, the District would still reserve the right to commence the leave earlier should liability or educational program become a consideration".
>
> (A. 28).

At all times relevant hereto, petitioners maintained a dualistic scheme of treatment of pregnant teachers, presuming them to be disabled and requiring them to submit to District doctors' examinations and to the final discretion of the District's officials as to their leaves if they sought to resist the presumption of disability (A. 16-24, 28), for leave purposes, while characterizing pregnancy-related periods of disability

as not compensable for purposes of payment of accumulated sick leave (A. 8, 88).

On or about January 9, 1973, counsel for Mrs. Berg sent a letter to Assistant Superintendent Mr. Teese, informing him that Mrs. Berg sought to follow her own physician's advice as to leave and that counsel viewed the compulsory leave and physician's examination requirement for pregnant employees, combined with denial of accumulated sick pay for pregnancy-related disabilities, as constituting a violation of Mrs. Berg's constitutional and statutory rights. (A. 29-33). In that letter, Mrs. Berg's counsel invited petitioners' agents to discuss the matter with her as soon as possible, if the necessity of litigation were to be avoided. (A. 33). No response to this letter of any kind was made by any of petitioner's agents.

Accordingly, on February 5, 1973, a complaint was filed in the District Court on behalf of Mrs. Berg and a purported class of female employees, alleging that petitioners' policies deprived these female persons of fair and equal treatment under color of law, in violation of the Fourteenth Amendment and 42 U.S. Code § 1983, and that petitioners' policies regarding pregnancy unlawfully discriminated against these female persons in violation of Title VII of the U.S. Civil Rights Act of 1964, as amended in 1972, 42 U.S. Code § 2000e et seq. (A. 5-8, 11, 12).

On February 21, 1973, a notice of Mrs. Berg's right of civil action under Title VII was issued by agents of the United States Department of Justice. (A. 80-81). On February 22, 1973, after briefing and

argument by the parties, the District Court ordered that the School District, Board and Superintendent be enjoined from compelling Mrs. Berg to take any leave for pregnancy other than a leave "when deemed necessary by [Mrs. Berg] and her physician". (Petition for Certiorari, App. C, pp. 30-34). The District Court specifically found that if it did not act to enjoin petitioners, they would force Mrs. Berg to begin leave on February 23, 1973. (Petition for Certiorari, App. C, p. 31). The District Court grounded its order upon a finding of irreparable injury absent injunction and upon a determination of the likelihood of Mrs. Berg's success on the merits of claims made pursuant to 42 U.S. Code § 1983 and the Fourteenth Amendment. (Petition for Certiorari, App. C, pp. 31-33).

On February 22, 1973, Mrs. Berg's counsel informed the District Court that Mrs. Berg's notice of right of action had been authorized by the U.S. Attorney General but was not yet sent out. (A. 78). On March 16, 1973, counsel for Mrs. Berg filed a copy of the notice of right of action with a supplemental memorandum regarding the District Court's subject matter jurisdiction as to Mrs. Berg's Title VII claims. (A. 1, 79-80). Each of petitioners' successive motions to dismiss Mrs. Berg's Title VII claims for alleged lack of subject matter jurisdiction, based upon the lack of the notice of right to sue, was filed after the March 16, 1973 filing of the notice of right of action. (A. 1-2, 92-93). The District Court refused to order that Mrs. Berg's Title VII claims be dismissed and refiled due to the issuance of the notice after filing of the complaint. (Petition for Certiorari, App. C, pp. 35-38). Instead, on June 25, 1973, the District Court granted Mrs. Berg's motion for leave to supplement her complaint to allege the issuance of the right-to-sue notice to her on February 21, 1973. (A. 94-95).

Both parties moved for summary judgment in this action. (A. 99, 106). On August 20, 1973, the District Court heard argument upon those motions, and it granted Mrs. Berg's motion for summary judgment. (A. 120). On August 31, 1973, the District Court filed a memorandum opinion, indicating that its order of summary judgment in favor of Mrs. Berg and a prospective class, certified pursuant to F.R.C.P. Rule 23, was grounded solely upon Title VII. (Petition for Certiorari, App. C, pp. 39-45). Judgment in favor of Mrs. Berg and a prospective class was entered by the District Court on December 5, 1973 (A. 4), and petitioners timely appealed to the Court of Appeals For the Ninth Circuit, which rendered an opinion affirming the judgment below on December 9, 1975 (Petition for Certiorari, App. A, pp. 1-11).

As of January 1, 1976, petitioners became subject to section 13456 of the California Education Code, which requires governing boards of school districts to provide for certificated employees' leaves due to pregnancy, miscarriage, childbirth and recovery therefrom by permitting the length and date of such leaves and date of return therefrom to be determined by the employee and her doctor, and further requiring governing boards to grant leaves with pay for pregnancy-related disabilities where necessary to assure

". . . that leaves of absence for disabilities caused or contributed to by pregnancy, miscarriage, or childbirth be treated the same as leaves for illness, injury or disability".

(Petition for Certiorari, App. D. pp. 52-53).

SUMMARY OF ARGUMENT

I. The District Court's subject matter jurisdiction of Mrs. Berg's Title VII claims was properly grounded upon a timely filed E.E.O.C. charge and a valid notice of Mrs. Berg's right of action, issued by the Attorney General after determination by the Department of Justice that it would not file suit on Mrs. Berg's behalf. The absence of notarization upon the E.E.O.C. charge in no manner defeats the purpose of Title VII, 42 U.S. Code §2000e-5(b), in that the charge was truthful and in that the E.E.O.C.'s promised assistance in finding a notary was not provided. Although the District Court had and exercised jurisdiction of the subject matter of Mrs. Berg's constitutional claims when it issued a preliminary injunction to prevent petitioners from forcing Mrs. Berg's leave, the Court of Appeals' interpretation of Title VII, permitting the exercise of subject matter jurisdiction to prevent violations of the Act in a limited class of cases where irreparable injury is imminent and where a great likelihood of success on the merits is shown, provides valid independent grounds for the District Court's jurisdiction. The Court of Appeals in this action correctly determined that the District Court was not required to order a *pro forma* dismissal and refiling of the part of Mrs. Berg's complaint per-

taining to Title VII, once her notice of right of action was issued. *Cf. Love v. Pullman Co.,* 404 U.S. 522, 526-527 (1972).

II. Operating in tandem, petitioners' policies governing pregnancy and childbirth discriminate on account of sex in violation of Title VII. While compelling pregnant women to depart *at whatever time* the School District's officials choose, and requiring women to submit to extraordinary medical examinations, the results of which petitioners reserve the "right" to ignore, based upon the image of these women as irrational and disabled, petitioners without reason deny these same persons the use of their earned sick leave pay during periods of actual disability due to pregnancy. *General Electric Company v. Gilbert,* 429 U.S. ....., 97 S. Ct. 401 (1976) does not hold that a scheme of treatment of employees such as the one at issue herein, which discriminates against women both by its stereotypical design and by its economically damaging effects, passes muster under Title VII simply because it is aimed at pregnant women.

III. Petitioners, acting with full knowledge of the constitutional rights of pregnant teachers to individualized, nondiscriminatory treatment (A. 17-20), deliberately engineered a policy, compelling teachers who were medically advised that they could work beyond petitioners' favored date, to submit to a District-selected physician's examination; moreover, this policy's bottom line consisted of petitioners' assertion of a right to select and enforce leave commencement dates, in all cases, without regard to any physician's

advice including their own, if they so chose (A. 28, 47-49). Petitioners' effort to justify this policy, which is far more extreme in its arrogation of final authority to the employer than the policies found violative of Fourteenth Amendment due process in *Cleveland Board of Education v. LaFleur* and *Cohen v. Chesterfield County School District,* 414 U.S. 632 (1974), rests wholly upon a stereotype of the women thereby affected as irrational persons who are incapable of finding and respecting their own good medical advice, and who are disabled, awkward, uncertain and ill-advised as a group. (A. 52-56). The petitioners' discriminatory treatment of pregnant women, for purposes of mandatory leave and examinations, cannot pass muster under 42 U.S. Code §2000e-2(a)(1) and (2).

IV. At no point in this litigation have petitioners offered any reason, much less the legitimate nondiscriminatory one that they were required to offer, according to *McDonnell Douglas v. Green,* 411 U.S. 792, 802 (1973), to explain their unwritten policy of rejecting accumulated sick pay claims for periods of disability arising from pregnancy. In the context of a motion for preliminary injunction in at least one similar case, the employer's failure to provide a reason for such conduct was held to support the employee's claim under the equal protection clause of the Fourteenth Amendment. *Bravo v. Board of Education of the City of Chicago,* 345 F.Supp. 155, 159 (N.D. Ill. 1972). Furthermore, petitioners' affording of paternity leave without loss of pay as a part of the selfsame scheme that compels maternity leave without pay

evidences petitioners' fundamentally sex-discriminatory outlook upon the rights of its male and female employees. Policies such as those at issue herein, which tacitly or expressly assume that men are the workers and wage-earners and that women and their families are tended financially by men, constitute unlawful sex-based discrimination wherever such policies operate to deny equal opportunity to women in the context of employment. 42 U.S. Code §2000e-2(a)(1) and (2). Respondent submits that petitioners' refusal, upon cross-motions for summary judgment, to provide any showing of a legitimate nondiscriminatory reason for petitioners' denial of accumulated sick pay earnings for days of actual disability due to pregnancy, constitutes an irremediable failure of proof, entitling respondent to affirmance of the judgment entered below, establishing the illegality under Title VII of petitioners' refusal to compensate female employees' claims to accumulated sick pay for days of disability caused by pregnancy.

ARGUMENT

I. PETITIONERS' SUNDRY JURISDICTIONAL ARGUMENTS ARE WITHOUT MERIT.

Petitioners in this action have sought to find "flaws" in the record, and to magnify them into purported defects in the jurisdiction of the District Court as to the subject matter of respondent Mrs. Berg's Title VII claims. As discussed hereinbelow, those efforts by petitioners to create impairments in the District Court's subject matter jurisdiction are unsupported

both by the language of the Act itself and by Title VII case decisions. Moreover, respondent contends that the wholly unreasonable nature of petitioners' jurisdictional arguments becomes obvious when it is considered that, on the one hand, petitioners contend that Mrs. Berg's E.E.O.C. charge was filed too soon and, on the other hand, that Mrs. Berg's notice of right of action upon said charge was issued too late. In short, petitioners seek to undermine Title VII's reach in exigent situations.

A. Mrs. Berg's E.E.O.C. charge was not premature, and the lack of notarization upon it should not be held to constitute a jurisdictional defect as to her Title VII claims.

As of November 15, 1972, when Mrs. Berg made and signed her E.E.O.C. charge, she was more than five (5) months pregnant; by this fact, Mrs. Berg then was subject to a written regulation of petitioners that compelled her to take leave from her employment some five (5) weeks later. (A. 16, 109). Nevertheless, petitioners assert that Mrs. Berg should have been required to wait to file her charge as to their compulsory leave policy until the date on which she was to be compelled to leave, contending that Mrs. Berg cannot be deemed to have been "aggrieved", in the terms of 42 U.S. Code § 2000e-5, until such occurrence.

That argument by petitioners resists recognition of the fact that the E.E.O.C. charge was filed by Mrs. Berg at a time when Mrs. Berg was directly and positively "aggrieved" within the meaning of the Act, because she was an "employee" of petitioner School

District, 42 U.S. Code § 2000e(f), who by virtue of pregnancy was personally subject to the policies of which she complained in her charge. (A. 109). By contrast, the plaintiff in *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442 (3rd Cir. 1971), cited by petitioners in support of their contention that Mrs. Berg was not "aggrieved" when she filed her E.E.O.C. charge, was found to lack standing to bring his Title VII class action because he had retired from the defendant's employ prior to filing suit.

Petitioners' claim that Mrs. Berg's E.E.O.C. charge was "premature" until she actually was forced to take leave also ignores the powers conferred by Title VII, which enable District Courts to *prevent* threatened violations of the Act, by means including issuance of injunctive relief where necessary. 42 U.S. Code § 2000e-5(g); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 764 (1976); *U.S. v. Hayes International Corp.*, 415 F.2d 1038 (5th Cir. 1969). This statutory provision and the cases broadly interpreting it would lose all meaning for purposes of *preventing* Title VII violations if, as urged by petitioners herein, employees first are required to suffer the entire injury sought to be prevented before filing charges.

Petitioners also contend that the District Court in this action lacked jurisdiction of the subject matter of Mrs. Berg's Title VII claims because the E.E.O.C. charge signed[1] by Mrs. Berg was not notarized. Under

[1]Petitioners concede that Mrs. Berg did sign below the statement, "I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief" (A. 109), stating that "[t]he charge purports to be under oath". (Brief of Petitioners, p. 3).

the circumstances of the instant case, in which petitioners continuously have failed to show that the absence of notarization of Mrs. Berg's signature in any sense has prejudiced them, and in which the E.E.O.C.'s express promise to assist Mrs. Berg in finding a notary, printed upon her charge, was not fulfilled (A. 109), respondent submits that to interpret the absence of notarization upon Mrs. Berg's E.E.O.C. charge as undermining the District Court's Title VII jurisdiction would loft form over substance, in ignorance of the remedial object of Title VII itself. *Love v. Pullman Co.*, 404 U.S. 522, 526-527 (1972).

Petitioners' reliance, upon the case of *E.E.O.C. v. Appalachian Power Co.*, ... F. Supp. ....., 13 E.P.D. ¶11,293 (W.D. Va. 1976) for support of a contrary determination, is misplaced. In that case, one of the E.E.O.C.'s own Commissioners failed to swear to a charge, on the basis of which a suit by the E.E.O.C. was commenced, under circumstances that caused the District Court to observe that the Commissioner's charge, had it been sworn to, might have been sworn to falsely in part. It is central to the distinction between *E.E.O.C. v. Appalachian Power Co.* and the case at bar that the E.E.O.C.'s fault in failing to assist Mrs. Berg in having her charge notarized, when on the face of the charge E.E.O.C. promised to do so (A. 109), should not be attributed to Mrs. Berg, whether or not the E.E.O.C.'s fault should be attributed to itself, in cases like *Appalachian Power Co., supra.* Furthermore, wholly in contrast to the charge in *E.E.O.C. v. Appalachian Power Co.*, there is neither

evidence nor inference supporting the idea that Mrs. Berg's E.E.O.C. charge was false in any detail.

If Congress' purpose in amending 42 U.S. Code § 2000e-5(b) to require E.E.O.C. charges to be filed under oath or affirmation was to prevent filing of false charges to the detriment of the charged parties, then plainly that purpose has not been disserved in the case bar, because Mrs. Berg made and signed a truthful charge to the E.E.O.C. in this action. For this basic reason, respondent's counsel contends that the matter of the lack of notarization upon Mrs. Berg's charge correctly was disposed of by the Court of Appeals' effective[2] refusal to characterize this "flaw" as a jurisdictional defect.

B. The District Court's denial of petitioners' motion to dismiss for lack of subject matter jurisdiction was proper.

Petitioners argue that the letter, carrying notice to Mrs. Berg of her right of civil action under Title VII (A. 80-81), was issued too soon by the Department of Justice and was filed too late in the District Court. Both of these mutually anomalous arguments of petitioners are without legal foundation.

Contrary to petitioners' representation that Title VII disallows issuance of a notice of right of action prior to the one hundred and eightieth (180th) day after the charge is filed, 42 U.S. Code § 2000e-5(f)(1) requires in relevant part that ". . . if within one hun-

[2]In the Circuit, petitioners pointed out the lack of notarization (Brief for Appellants, pp. 10, 16), but they cited no authority rendering it a jurisdictional defect. Perhaps this accounts for the Court of Appeals' omission of any discussion of this matter in its opinion.

dred and eighty (180) days from the filing of such charge . . ." the Attorney General has not filed a civil action or entered into a conciliation agreement upon the said charge, notice of the charging party's right of action *shall* be issued upon the party's request. Nothing in 42 U.S. Code § 2000e-5(f)(1) prohibits the procedure followed by the Department of Justice in the case at bar, consisting of a determination that the Department would not proceed upon the charge, followed by prompt issuance of notice to Mrs. Berg as to her private right of action, especially in light of the urgent need for an action for preliminary injunctive relief to prevent Mrs. Berg's employer from forcing her to leave. (Petition for Certiorari, App. C, p. 31).

The attempt by petitioners to characterize the issuance of a "right-to-sue" letter to Mrs. Berg on February 21, 1973 as part of an unduly hasty flight to the federal courthouse ignores the record fact that Mrs. Berg's counsel's effort to avoid suit, by a letter sent to petitioners' agents in early January, 1973 (A. 29-33), was rendered futile by petitioners' choice not to respond, apparently on the ground that they did not know that the letter from Mrs. Berg's counsel actually was from Mrs. Berg's counsel (A. 88). Petitioners' argument that the expeditious issuance of Mrs. Berg's notice of right of action interfered with their opportunity to correct their compulsory leave policy to comport with Title VII further is betrayed by the factual record in this action, showing that as of *November 29, 1972,* more than two months before Mrs.

Berg filed suit, the petitioners were aware of claims of sex discrimination by pregnant employees who were affected by their policies. (A. 17-20). Mrs. Berg's suit was filed on February 5, 1973, at a time when she was informed that she was approximately seven and one-half (7½) months pregnant and was imminently subject to compulsory leave. (A. 16). Instead of permitting pregnant teachers as a group to abide by their own physicians' advice as to duration and commencement of leave, as Superintendent Snodgrass himself observed was the gist of the relevant case law as early as November 29, 1972 (A. 17), petitioners chose to elaborate a new series of compulsions upon the leave choices of their pregnant employees (A. 17-24, 47-51). It would strain truth itself to conclude that these petitioners, who were well-informed of the nature of pregnant employees' complaints concerning their compulsory leave policy as of November, 1972, were deprived of any opportunity to mend their ways under Title VII before Mrs. Berg filed suit on February 5, 1973, seeking to prevent a compelled departure from her employment contrary to her own physician's advice. (Petition for Certiorari, App. C, pp. 30-31).

C. The Court of Appeals' interpretation of Title VII's provisions governing subject matter jurisdiction in certain emergency cases stands in full conformance with the Act itself, and with case law defining jurisdictional prerequisites to suit.

Petitioners' labyrinthine arguments to this Court, positing that the interpretations of subject matter jurisdiction under Title VII rendered by the Ninth Cir-

cuit in this action is greater in scope than the Act permits, are unsupported by Title VII itself. Title VII authorizes the bringing of suits by the E.E.O.C. (and, until March 24, 1974, by the Attorney General, in cases involving certain governmental employers, 42 U.S. Code § 2000e-6(c)) *prior* to final disposition of underlying charges, "[w]henever . . . prompt judicial action" is necessary. 42 U.S. Code § 2000e-5(f)(2). In the case at bar, the Court of Appeals determined that "[i]n a limited class of cases such as this one", where both the threat of irreparable injury and a high probability of success on the merits are shown, an action by a charging party seeking preliminary injunctive relief is authorized under Title VII, once the charge is filed. (Petition for Certiorari, App. A, p. 6). Petitioners have not cited a single Title VII authority—within the statute and its history nor within its judicial precedents—that challenges this conclusion by the Ninth Circuit.

Instead, petitioners (and *not* the Courts below) confuse the District Court's subject matter jurisdiction, pursuant to 28 U.S. Code § 1343, as to Mrs. Berg's claims grounded upon 42 U.S. Code § 1983, with the District Court's wholly separate and distinct jurisdiction of the subject matter of Mrs. Berg's Title VII claims. (Brief of Petitioners, p. 23). In the case at bar, the District Court had jurisdiction of the subject matter of Mrs. Berg's § 1983 claims from the date of filing of her complaint, and it issued a preliminary injunction on the basis of that subject matter jurisdiction. (Petition for Certiorari, App. A, pp. 4-6).

Petitioners in this action consistently have resisted the recognition that the two "jurisdictional prerequisites" to the filing of a Title VII action by a charging party or parties (*to wit,* timely filing of a charge and receipt of a notice of right of action) are not absolute. Rather, these "prerequisites" are the product of judicial interpretation of Title VII, and not of any express declaration as to what constitutes jurisdictional prerequisites in the language of the Act itself. By resisting this recognition, petitioners next seek to recharacterize the Court of Appeals' interpretation of Title VII jurisdiction in the case at bar as a "departure" from the will of Congress as to *when* District Courts shall have jurisdiction of the subject matter in Title VII cases. The fact remains that, while Congress clearly set up administrative procedures preliminary to the bringing of Title VII cases, each of which was followed in the case at bar, nowhere in Title VII did Congress state, as petitioners wish, that a District Court may not issue a preliminary injunction to prevent Title VII's violation until after the E.E.O.C. sends a letter to an aggrieved person who has filed a charge, nor that issuance of such a letter within two and one-half (2½) weeks after suit is commenced on the independent jurisdictional bases of Title VII and section 1983 requires the complaint to be dismissed and refiled, rather than being supplemented pursuant to F.R.C.P. Rule 15(d), as was ordered in the case at bar. (A. 94).

In *Stebbins v. Continental Insurance Co.'s.,* 442 F.2d 843, 845-846 (D.C. Cir. 1971), the Court of Appeals determined in pertinent part that:

> ". . . *in the absence of special circumstances* [e.g. hardship to plaintiff], the notice of right to sue is a jurisdictional prerequisite to suit". (emphasis added).

Unlike the plaintiff in *Stebbins, supra,* respondent Mrs. Berg filed a charge and sought issuance of a notice of her right of civil action, in emergency circumstances. (A. 84-86, 109). The fact that the District Court validly granted Mrs. Berg leave to supplement her Title VII claims, by filing of the notice shortly after filing of the complaint, hardly imports a jurisdictional defect, whether viewed in terms of the *Stebbins* rule cited above or in terms of the language of Title VII itself.

II. PETITIONERS' TREATMENT OF PREGNANT EMPLOYEES IS BOTH DESIGNEDLY AND EFFECTIVELY SEX-DISCRIMINATORY, IN VIOLATION OF TITLE VII.

Petitioners deliberately have whipsawed pregnant employees as a matter of policy. Having full knowledge that their pregnant employees sought treatment as individuals (A. 20), petitioners propounded a mandatory leave policy that automatically treats these women as disabled, on the basis of a so-called "average" (A. 19, 47, 52-55) and as so irrational that they cannot find and follow proper, individualized medical advice as to their health needs relative to their employment (A. 28, 47). Simultaneously, petitioners characterized all members of this same group as not disabled for purposes of receiving accumulated sick pay, on the irreconcilable ground that "normal pregnancy is a natural condition and not an illness" (A. 56).

This whipsaw, designed and enforced by petitioners against their pregnant employees, violates Title VII. Both its purpose and its effect are to compel the making of certain significant employment-related choices for all women on the basis of a sex-stereotyped image of the "average" woman (A. 53-56), while at the same time to deny women equal opportunity in the receipt of earned sick pay for disabilities arising from pregnancy and childbirth, contrary to that selfsame expedient "average" of the disabled pregnant employee (A. 8, 88).

While the respondents in the case of *General Electric Co. v. Gilbert,* 429 U.S. ....., 97 S.Ct. 401 (1976), were determined by a majority of this Court not to have shown that their employer's exclusion of pregnancy-related disabilities from insurance coverage purposively of effectively discriminated on account of sex, respondent in this action submits that the instant record shows both purposive and effective sex-based discrimination in petitioners' treatment of pregnant employees.

In order to justify compulsory leave and mandatory physical examinations, for the class of pregnant women whose own doctors determine different dates for commencement of leave than various agents of petitioners prefer, *and for no other class of employees,* petitioners assert that *all* pregnant women are "likely to be temporarily disabled" (A. 53), are "often awkward and uncertain when standing or walking" (A.

54), and so forth (A. 54-55), and that the medical advice of this group's doctors as to leave thus must be disregarded by the School District's officials (A. 56).

Petitioners' categorical interferences with the medically advised decisions of pregnant employees as a group, based upon the express proposition that *all* such persons are so disabled in their last month that they must be compelled to take leave, then *if not before* and regardless of their own individualized medical advice (A. 56), can only be reconciled with petitioners' denial of accumulated sick leave pay to these same persons upon the purported ground that they are not disabled (A. 56), by reference to petitioners' discriminatory intent. In this scheme of petitioners, women are a part of the workforce who may be forced to submit to extraordinary examinations and to take leave, regardless of their own doctors' advice, under the pretext of petitioners' protection of them, their foetuses and their students (A. 47-51), while being denied the sick leave pay that their years in service have earned them, upon the grounds that these women actually are not disabled, whether during delivery, recuperation after childbirth, or otherwise.

In the equal protection case of *Washington v. Davis,* 426 U.S. 229, 253 (1976), Mr. Justice Stevens observed in relevant part in a concurring opinion that: ". . . the most probative evidence of intent [is] . . . objective evidence of what actually happened . . ." In the case at bar, what actually happened must be measured by petitioners' own statements, simultaneously insisting upon retaining the prerogative of compulsory maternity leave under a guise of "protection", while refusing to pay sick benefits to those who had been deemed "disabled" in order to justify compulsory leave. These facts evidence petitioners' overarching purpose to discriminate against certain women employees, by manipulating the terms and conditions of their employment to the detriment of their economic equality and human liberty, under the pretext of "protecting" these women, their offspring and their students. (A. 47-56). This transcendent discrimination, permeating every facet of petitioners' treatment of pregnant employees, was held below to violate Title VII. Petitioners have offered this Court no good reason to find that holding incorrect.

As argued hereinabove, the double-edged stereotype of pregnant women that petitioners' policies wield can only be explained by reference to an impermissible purpose to discriminate. Moreover, the discriminatory effects of petitioners' policies, working in tandem, are equally obvious: the pregnant female who is advised by her own physician that she may work beyond petitioners' favored date of leave is at petitioners' mercy: she must try to prove both to a District-selected physician (A. 26, 47) and to a District official (A. 47; Petition for Certiorari, p. 61) that she is an "exception" to the "average" of disability (A. 56), while she is denied the sick pay benefits that she has earned by means of years in service, for every day of disability that is actually suffered by her (A. 8, 88).

This case is altogether different from the case of *General Electric Co. v. Gilbert,* 429 U.S. ....., 97 S.Ct. 401 (1976), in several critical respects. Foremost among these differences is the failure of petitioners at any stage of this action to offer a basis for their contradictory treatment of pregnant employees. Unlike the government in *Geduldig v. Aiello,* 417 U.S. 484 (1974), and unlike the employer in *General Electric Co., supra,* petitioners herein have offered no legitimate, nondiscriminatory reason whatsoever for their policies, as required by this Court in *Geduldig v. Aiello* (". . . lawmakers are constitutionally free to include or exclude pregnany from the coverage of legislation such as this *on any reasonable basis* . . .", 417 U.S. at 496-497, n. 20 (emphasis added), and in *General Electric Co., supra.*

Whatever the distinctions between Fourteenth Amendment and Title VII standards as to a proper defense to an initial showing of discrimination may be, petitioners have failed to meet *any* standard of defense in this case. Not only have petitioners failed to rebut the record showing that their unwritten policy prohibiting payment of earned sick leave to a class of women is a matter of whim, and not of any demonstrable fiscal or other considerations, such as in *Geduldig v. Aiello, supra.* In the entire course of proceedings upon this action, petitioners have not uttered a single word in justification or even in explanation of their policy of refusing to pay earned, accumulated sick leave for actual disabilities caused by pregnancy.

Furthermore, petitioners' proposed reasons for compelling maternity leave and for ordering physical examinations essentially contradict their actions in refusing to afford accumulated sick leave earnings in this context. While professing to "protect" women and their foetuses by the steps of compelling their leave and ignoring their own physicians' advice, petitioners are taking away the livelihoods of women forced out of work, able and disabled alike, by refusals to pay accumulated sick leave earnings for days of actual disability. Surely this contradictory treatment of the subject class cannot be favorably compared to a situation in which the decision-maker proves the existence of some reason, of whatever strength, for its policy.

Title VII requires more, in the view of this Court. The employer must show a legitimate nondiscriminatory reason for its policies, once the complainant's *prima facie* showing is made. *McDonnell Douglas Co. v. Green,* 411 U.S. 792, 802 (1973). By proving that petitioners summarily refused to afford accumulated sick pay to a class of women because they are "not disabled", while forcing leaves and examinations because they are "disabled", respondent submits that she offered a *prima facie* showing that Title VII was violated by petitioners' treatment of the class of women herein. Petitioners then rested on their supposed prerogatives to treat women employees as they pleased (A. 105-121). Respondent respectfully submits that petitioners' complete failure to put on any

defense,[a] after respondent's factual and legal showing of entitlement to summary judgment under Title VII, fully supports the affirmance by this Court of the judgment entered below against petitioners.

III. WITHOUT REGARD TO THE WHIPSAW NATURE AND CONSEQUENCES OF PETITIONERS' PREGNANCY POLICIES OPERATING TOGETHER, PETITIONERS' COMPULSIONS AS TO THE LEAVE CONDITIONS OF PREGNANT EMPLOYEES VIOLATE TITLE VII.

The two features of petitioners' leave policy that respondent contends manifestly has discriminated against Mrs. Berg and her class on account of sex are (1.) the compulsion upon every woman to take leave at a given time, and the further compulsion upon any woman who seeks to work beyond the District's favored date to be examined by a doctor not of her own selection, but of the District's, who will decide regardless of her attending physician's advice when she shall depart for leave (A. 28, 47; Petition for Certiorari, p. 60); (2.) the reservation to District officials of a power to compel pregnant employees to commence leave at any time, in the caprice of those officials (A. 47; Petition for Certiorari, p. 60).

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[a] In oral argument upon the parties' cross-motions for summary judgment, petitioners' counsel refused to provide any reason to support the challenged policies (A. 114-121). The following exchange between court and counsel typifies this refusal:

> "The Court: . . . What about the summary judgment as to the individual claim? . . . Shouldn't I enter it?
>
> [Petitioners' Counsel]: I don't think Your Honor should enter it . . ."
>
> (A. 116).

As to the first of these compulsory characteristics of petitioners' policy, which respondent contends is discriminatory against women both in its purpose and in its effect in patent violation of Title VII, petitioners' sole justification consists of gross sex-stereotyping. Petitioners' compulsion upon pregnant employees to be examined by their doctor, although these persons' own physicians prescribe that they may work until a certain date, is based upon a stereotype of pregnant women as doddering, irrational fools, who must be forced away from the care and advice of their own presumptively untrustworthy attending physicians, into the unfamiliar hands of District-selected physicians (A. 28, 47-56) who will examine them and thereby decide matters such as whether these women are wearing inappropriate shoes (A. 54) and whether they are safe drivers (A. 48). Assuming *arguendo* that there may exist pregnant women in petitioners' employ who are too ill or too ill-advised to take leave for pregnancy when it is medically reasonable to do so, nothing in the record of the case at bar proves that *all* pregnant women as a class (unlike all hernia patients, all candidates for oral surgery, and so on) validly may be assumed not to know what they are doing. Respondent submits that the primary offense to Title VII accomplished by petitioners' mandatory examination and leave policies consists in their operative premise, *to wit,* that *all* women, who are under the care of doctors who disagree with District officials' notions of propriety during pregnancy, are on that basis alone to be treated as irrational persons

who must be coerced into doing what petitioners define as best for them. (A. 28, 47-56).

Petitioners' forced leave policy has been characterized by them to this Court as one "providing for individual consideration of the starting dates for maternity leave" based upon "an authoritative medical opinion . . .". (Brief for Petitioners, p. 45). The record in this action completely contradicts that characterization. By the policy's express terms, *all* pregnant schoolteachers may be compelled to commence leave *whenever* the District's officials choose. (A. 19, 47). *All* pregnant schoolteachers whose attending physicians direct that they are medically able to work during the last month of pregnancy, or any part thereof, are compelled to undergo examination by a District-selected physician. If the District's physician's opinion supports a leave date that petitioners' agents do not like, that opinion can be *overridden* by the District's non-physician officials. (A. 28, 47-51).

Central to respondent's claim that petitioner's mandatory leave, examination and departure policy, designed and applied only as to pregnancy is sex-discriminatory is the policy's embodiment of a sex-stereotyped image of pregnant school employees as a class of women who cannot make rational choices, even about the qualifications and medical advice of their own attending physicians during pregnancy (A. 28, 49, 56). The primary evidence of this stereotyping in the record, other than Superintendent Snodgrass's derogatory remark that the sole reason for pregnant

teachers' objections to the petitioners' compulsory leave policy consisted of "the publicity given to court cases" (A. 19-20), and the petitioners' continuing refusal to give pregnant employees and their own doctors the same general right to select rationally informed leave dates that other employees have, consists of the affidavit of Dr. Maxwell Thebault, which petitioners claim to be "an authoritative medical opinion" on the basis of which they divined their compulsory policy. (A. 52-56; Brief of Petitioners, p. 45). Dr. Thebault's affidavit is replete with stereotypes of pregnant women, having little more than forensic medicine to commend them to this Court over a vast array of sex stereotypes offered and rejected in other Title VII actions. *See, e.g., Rosenfeld v. Southern Pacific Co.,* 444 F.2d 1219 (9th Cir. 1971) (stereotype of physically weak women rejected); *Diaz v. Pan American World Airways, Inc.,* 442 F.2d 385 (5th Cir. 1971), cert. den., 404 U.S. 950 (1971) (stereotype of psychologically non-nurturing men rejected); *Phillips v. Martin Marietta Corporation,* 400 U.S. 542 (1971) (stereotype of female parents as unreliable workers questioned) (per curiam).

Dr. Thebault states that in the six weeks prior to an estimated delivery, schoolteachers are "*likely* to be temporarily disabled" by ". . . urination . . . incontinency . . . false labor . . . true labor" (A. 53-54), "*often* awkward and uncertain when standing or walking" (A. 54), "*peculiarly* vulnerable to even modest elements of jostling and bumping" (A. 55), ". . . can be *expected* to have *unusual difficulty* in coping

with . . . student fights, accidents and illnesses" (A. 55), and that pregnant teachers ". . . *easily* become so disabled by [their] own movements . . . that [they] would be helpless to take any effective action" (A. 55).

If this affidavit does not amount to obvious sex-stereotyping of pregnant women, then plainly doctors are immune from sex-based prejudices. At least one federal court has held otherwise, on the issue of doctors offering stereotyped views of particular groups of females as helpless and injury-prone, in order to justify sex-based discrimination against them. *Fortin v. Darlington Little League,* 514 F.2d 344, 350 n. 5 (1st Cir. 1975).

On the basis of the kinds of generalities recited above, Dr. Thebault announces that:

> "[i]n my opinion, considering a teacher of average stamina, health and normal pregnancy, a rule *requiring her to stop working* at least six weeks prior to her estimated date of delivery would be consistent with conservative medical practice, and most specialists in obstetrics and gynecology would recommend against her continuing to work within four weeks of her estimated date of delivery."
>
> (A. 56) (emphasis added).

Historically, discriminatory treatment of women has derived in significant part from the concept that members of the female sex are inherently irrational creatures who, like children, slaves and demented persons, must be restricted and overseen by the legal

system *in loco parentis.* Professor W. Friedman has observed, in this regard, that:

> ". . . Certain natural inequalities, such as the difference in the legal status of infants and adults, or of insane and sane persons, do not touch the foundations of democracy . . .
>
> Neither the limitation of franchise or other civil rights, nor legal inequality between men and women nor between white and black races, nor differentiations in the legal positions of nationals and foreigners, are compatible with the basic legal ideals of democracy, yet all these inequalities still exist, to a greater or smaller degree."
>
> —*Legal Theory* 416 (1967).

Contributors to jurisprudence, both ancient[4] and contemporary,[5] have recognized the essential relationship between a legal view of women as an irrational, childlike class and the consequence: all women are rendered unnecessarily unequal and unfree. Respondent contends that the obvious premise of petitioners, that pregnant women as a class are incapable of making rational decisions, upon medical advice, to the same extent as do prostatectomy patients, injured skiers and every other group of employees making employment-related medical choices, makes the compulsory leave and examination policy at issue herein discriminatory on account of sex in its very design.

There are Title VII cases in which a discriminatory purpose is the sole purpose that satisfactorily explains relevant conduct or events. *See, e.g., Gibson*

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[4]*The Republic of Plato,* 145-155 (F. Cornford trans. 1966).
[5]J. Rawls, *A Theory of Justice,* 247-249 (1971).

v. Local 40, 543 F.2d 1259, 1266-1267 (9th Cir. 1976). Respondent Mrs. Berg submits that such a fact situation is presented of record in the case at bar, by virtue of the absence of any reason by petitioners for their compulsory leave and examination policy, other than the view that respondent Mrs. Berg and others who seek to continue working must be treated as irrational and ill-advised women, who are unconcerned about their health, their foetuses' health and their schoolchildren's well-being. (A. 47-56). Thus, to the extent that the element of the employer's purpose may be relevant to a determination that Title VII has been violated, respondent submits that unrebutted evidence of a sex-discriminatory purpose has been presented herein, by the statements made by and on behalf of petitioners themselves in purported justification of the leave policy herein at issue. (A. 17-20, 28, 47-56). *General Electric Co. v. Gilbert, supra,* 97 S.Ct. at 408-409.

Separate and apart from the record evidence that petitioners knowingly have whipsawed pregnant females in their employ by compelling leaves on grounds of "disability" while denying sick pay on grounds of "non-disability", the record in this action shows that Superintendent Snodgrass recommended continuation of a compulsory and non-individualized maternity leave policy to the Board, with full knowledge of the claim that such policies discriminate against women. (A. 17-20). Petitioners then sought to justify that policy in this lawsuit on the basis of sex-based stereotyping of a class of pregnant women. (A. 52-56).

Finally, respondent emphasizes that the sex-discriminatory structure and foundation of petitioners' mandatory policy is in no way legally undermined by the fact that it discriminates only against some women (those subject to pregnancy, whether voluntarily or otherwise) and not against *all* women. Title VII expressly prohibits sex-based discrimination in employment against each and every *individual* employee. 42 U.S. Code §§ 2000e(f) and 2000e-2(a)(1) and (2). Petitioners argued in the Ninth Circuit that the:

> ". . . interim maternity leave policy does not violate § 2000e-2(a)(1) and (2), *since the policy is applicable only to pregnant females and not all females.*"
>
> (Brief for Appellants, p. 19; emphasis added)

The above-quoted position of petitioners, if adopted by this Court, would spell the end to Title VII actions challenging employment discrimination aimed at one or more, but less than all, female employees. Contrary to petitioners, respondent does not understand the opinion of this Court in *General Electric Company v. Gilbert, supra,* to mean that where an employer discriminates against less than 100% of its female employees, the employer will be exempted from Title VII liability.

That the discriminatory effects of petitioners' compulsory examination and leave policies are suffered solely by women is an unembroidered fact. *Only* pregnant females as a class suffer the consequences of having to commence leaves, and to depart their employment, at times chosen not by themselves and

their doctors but by petitioners and petitioners' agents. (A. 118-119; Petition for Certiorari, App. C, p. 40). No other condition or bodily process other than pregnancy *automatically* subjects *every* person who tries to exercise a personal, medically advised choice to work beyond an arbitrary leave date to an examination by a doctor, selected not by that person but by her employer, whose opinion may be disregarded by petitioners' agents in any case. (A. 28, 47-51, 118-119). The pregnant employee who chooses to abide by her own doctor's advice, and who refuses to be examined by a doctor who is a total stranger to her individual case, acts in violation of the employer's declared policy, and risks the employer's sanction of compelled leave. (A. 28; Petition for Certiorari, App. C, p. 31).

Considered by itself, and without regard to the requirement of a District doctor's examination, the petitioner's compulsory leave policy also imposes sex-discriminatory consequences. In the case at bar, petitioners have gone substantially further than school officials went in the compulsory leave schemes found by this Court to violate the Fourteenth Amendment in *Cleveland Board of Education v. LaFleur* and *Cohen v. Chesterfield County School Board,* 414 U.S. 632 (1974). Nonetheless, invoking some favorable dictum from this Court's opinion in those cases, and ignoring this Court's statement therein that pregancy-related emergencies may be handled like all others, 414 U.S. 632 at 642, n. 10, petitioners declare that:

> ". . . [t]he School District's interim maternity leave policy provisions are valid under this Court's decision in *Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974)."
>
> (Brief for Petitioners, p. 45).

This statement by petitioners ignores the record fact that, unlike the school officials in *LaFleur* and *Cohen, supra,* these petitioners moved backward from a mandatory leave line, with knowledge of the case law and of the discrimination charges of women teachers (A. 17-20), to a policy asserting the School District's "right" to mandate and order leave *at any time* during pregnancy. (Compare the original policy at A. 16, to the "interim policy", set forth in the Petition for Certiorari, App. E, p. 60, providing in relevant part that "[t]he Assistant Superintendent may determine a beginning date for an employee's maternity leave *earlier or later* than 30 days before the expected date of delivery . . .") (emphasis added).

To have one's work and livelihood taken away by the determination of non-physician officials, basing their compulsions and prerogatives upon a view of pregnant women as a class of incompetents and not upon the individual woman's situation, can be termed nothing if not sex-discriminatory. In the *LaFleur* and *Cohen* decisions, this Court expressly reserved the question of the validity of pregnancy leave programs under Title VII, and relevant guidelines and regulations. 414 U.S. at 638, n. 8.

Even compulsory maternity leave policies that do not arrogate a final generalized power to the employer to choose and enforce leave commencement

dates at any time in pregnancy consistently have been found wanting by federal courts, both in the Title VII context, *see, e.g., Oakland Federation of Teachers v. Oakland Unified School District,* ..... F. Supp. ....., 10 E.P.D. ¶ 10,322 (N.D. Cal. 1975); *Vineyard v. Hollister Elementary School District,* 64 F.R.D. 580 (N.D. Cal. 1974); *Newmon v. Delta Airlines,* 374 F.Supp. 238 (N.D. Ga. 1973), and in Fourteenth Amendment terms, *see, e.g., Paxman v. Wilkerson,* 390 F.Supp. 442 (E.D. Va. 1975); *Green v. Waterford Board of Education,* 473 F.2d 629 (2nd Cir. 1973); *Buckley v. Coyle Public School System,* 476 F.2d 92 (10th Cir. 1973) (reversing summary judgment to school officials); *Williams v. San Francisco Unified School District,* 340 F. Supp. 438 (N.D. Cal. 1972). The policy of petitioners hardly should or can be salvaged from disposition pursuant to this line of precedents concerning the unlawfully sex-discriminatory nature of mandatory maternity leave schemes, especially given that this policy, additionally, is overtly based upon a sex stereotype of pregnant women as irrational *per se,* and given that, unlike the policies invalidated in each of the above-cited cases, the policy at issue herein expressly reserves a right on the employer's part to order leaves to begin whenever the employer chooses.

The combination of an evident sex-discriminatory design and equally evident sex-discriminatory effects places petitioners' interim maternity leave policy squarely in violation of Title VII. *General Electric Co. v. Gilbert, supra,* 429 U.S. ....., 97 S.Ct. 401, 408-410. In its determination that petitioners' leave policy

discriminates against women in violation of Title VII, the Court of Appeals did not err, despite its partial reliance for its conclusion upon a Guideline of the E.E.O.C. that this Court since has criticized in the distinguishable context of *G.E. v. Gilbert, supra.* Unlike *G.E. v. Gilbert,* respondent contends that petitioners' maternity leave policy was designed with knowledge of its discriminatory effects, in violation of Title VII, and respondent respectfully urges that this Court affirm the Court of Appeal's judgment in favor of Mrs. Berg and her class upon this question.

IV. PETITIONERS' UNWRITTEN POLICY DENYING ACCUMULATED SICK PAY FOR DAYS OF ACTUAL DISABILITY SUFFERED BY PREGNANT WORKERS VIOLATES TITLE VII.

The policy of petitioners that prohibits drawing upon accumulated sick pay by a worker who is disabled by pregnancy concededly is unwritten. (A. 8, 88). No pregnant employee, who believes that she may claim the requisite portion of her accumulated sick pay for a period of actual, medically certified disability caused by pregnancy, is informed to the contrary by the language of petitioners' policies governing sick leave. (A. 112-113). The fact that petitioners' policy is unwritten is relevant to its susceptibility to use as a "cover" for invidious discrimination against female workers, for the policy's informality lends itself to expansive readings against the claims of female employees. Moreover, the form of this policy stands in sharp contrast to the formal written exclusion of pregnancy-related disabilities from the insur-

ance plan challenged in *General Electric Co. v. Gilbert, supra,* 429 U.S. ....., 97 S.Ct. 401.

Nevertheless, at first perusal it might appear that petitioners' refusal to afford accumulated sick pay for days of actual disability due to pregnancy is governed by the view taken by a majority of this Court in *General Electric Co. v. Gilbert* that the employer is not discriminating on account of sex by refusing to afford compensation, pursuant to its insurance program, for pregnancy-related disabilities.

The resemblance between the instant case and *General Electric Co. v. Gilbert* on this issue ends at the surface. Several factual characteristics of the insurance scheme that were deemed important by this Court's majority in *General Electric Co. v. Gilbert, to wit,* the contingent nature of the value of insurance and the purported actuarial basis for risk selection, are wholly absent in the accumulated sick leave scheme in the case at bar (A. 111-113). It could reasonably be said that to the same extent that those factors caused a majority of this Court to perceive a controlling analogy in the precedent of *Geduldig v. Aiello, supra,* 417 U.S. 484, the absence of those insurance considerations in the case at bar renders the instant case most closely analogous to the case of *Turner v. Department of Employment Security,* 423 U.S. 44, 45 fn* (1975) (per curiam). Petitioners' conclusive presumption of a pregnant employee's *non-disability* for purposes of denying accumulated sick leave, surely is as vulnerable to the claim of a denial of due process as was the opposite presumption in *Turner, supra.* Respondent recognizes that the instant

action addresses not a due process claim but a Title VII claim; however, it is quite apparent that the presence of a conclusive presumption in employment, depriving persons of liberty and property in a given case, may signal not only a due process violation, but a violation of Title VII, where that conclusive presumption is aimed at the sex, race, religion or color of those it purports to govern. 42 U.S. Code § 2000e-2(a)(2).

Assuming *arguendo* that as a factual matter the earned sick pay scheme at issue herein validly may be analogized to the disability insurance scheme in *General Electric Co. v. Gilbert, supra,* the record in the case at bar does not support or reflect the idea that the prohibition of petitioners against use of accumulated sick pay for periods of disability due to pregnancy resulted from a gender-neutral risk selection process. *General Electric Co. v. Gilbert,* 429 U.S. ....., 97 S.Ct. 401, 409.

Petitioners' only effort to explain their policy in this action consisted of a reference to state law; the state law provisions to which petitioners refer do not explain their conduct. The California statute empowering school districts to enact rules governing maternity leave, as of the time of commencement of this action, declared in pertinent part:

> "Nothing in this section shall be construed to deprive any employee of sick leave rights under other sections of this code for absences due to illness or injury resulting from pregnancy."
>
> California Education Code § 13456 (Petition for Certiorari, p. 52).

Respondent submits that the above-quoted provision of California law plainly is in harmony with petitioners' Title VII duties to avoid sex-based discriminatory policies such as those challenged in this action. At least one District Court sitting in California has so ruled, in *Oakland Federation of Teachers v. Oakland Public Schools,* ..... F.Supp. ....., 10 E.P.D. ¶10,322 (N.D. Cal. 1975); that interpretation of state statutory law is entitled to some respect. *Cf. Bishop v. Wood,* 426 U.S. 341, 345 (1976).

In the case at bar, Mrs. Berg at no time has claimed a right, on her own behalf or that of any other pregnant class member, to draw accumulated sick pay for any time out of employment that is not directly and unambiguously attributable to actual disability. Indeed, the district court's permanent injunction was tailored to require the availability of earned sick leave pay only for days of actual disability (Petition for Certiorari, App. C, p. 47), thus prohibiting any claims to accumulated sick pay that are not based on the employee's actual condition of medical disability from employment.

Petitioners argue that the California statute in effect at the time that they denied accumulated sick pay for days of actual disability due to pregnancy allowed them to do so. Putting aside the principle that Title VII should be read and has been read to supersede conflicting state laws which invite or allow sex-based discrimination in employment, *see, e.g., LeBlanc v. Southern Bell Telephone and Telegraph Co.,* 460 F.2d 1228 (5th Cir. 1972), cert. den.;

(Petition for Certiorari, App. C, p. 41), respondent contends that California Education Code §13456 did not in its terms permit petitioners to refuse to pay accumulated sick leave benefits for those days in a given employee's pregnancy where there was actual, documented illness due to pregnancy. *See* §13456, quoted in relevant part above; *see also, Oakland Federation of Teachers v. Oakland Public Schools, supra.*

For Title VII purposes, petitioners' refusal to permit accumulated sick pay for days of actual disability due to pregnancy differs from the policy excluding pregnancy-related disabilities from insurance at issue in *General Electric Co. v. Gilbert, supra,* in several respects. In the case at bar, there is evidence that petitioners' refusal to afford accumulated sick pay is part of an overarching scheme of sex discrimination against pregnant schoolteachers, founded upon an invidiously discriminatory perspective upon the pregnant schoolteacher as one who must be forced to take leave because of a stereotype of her condition of "temporary disability" (A. 52-56) while being denied accumulated sick pay when she actually does become disabled, during and after delivery or otherwise (A. 8, 88).

Furthermore, there is record evidence that petitioners' refusal to afford accumulated sick leave compensation to the pregnant schoolteacher is part of a sex-stereotyped view on the part of petitioners that the father is and should be the primary breadwinner during the mother's pregnancy. While refus-

ing to afford the employee mother her earned sick pay for days of actual disability, petitioners' policy as to fathers provided that:

> "[p]aternity leave of one (1) day may be granted the male employee *without loss of pay* during or after the confinement of his wife . . ."
>
> (A. 16) (emphasis added).

This "have-a-cigar" approach to the economics of childbirth supports respondent's claim as to the sex-discriminatory purpose and effect of petitioners' denial of accumulated sick pay, in that it evinces petitioners' view that the (slight) economic loss of the father missing a day of employment due to his wife's childbirth is compensable, while the delivering mother cannot even draw her earned benefits during days of actual disability arising therefrom.

This palpably sex-based inequity in petitioners' treatment of pregnancy and childbirth may seem trivial, but respondent contends that, in the context of petitioners' maternity policies, it is probative of respondents' position that petitioners' denial of earned sick pay to pregnant employees in the case at bar is founded upon nothing but an impermissibly sex-discriminatory view of fathers as breadwinners and mothers as economic dependents, leading to sex-differential leave and pay policies in violation of Title VII. *Cf. Weinberger v. Wiesenfeld,* 420 U.S. 636 (1975); *Frontiero v. Richardson,* 411 U.S. 677 (1973). Thus, to the extent that this Court's approach in *General Electric Co. v. Gilbert, supra,* 429 U.S. ....., 97 S.Ct. 401, 407-408, concerning the relevance

of equal protection decisions in instances where the application of Title VII's prohibitions is ambiguous, may be held to apply to the case at bar,[6] respondent observes that this Court has found governmental schemes that assume men to be breadwinners and women to be economically dependent upon their husbands, and that thereby discriminate on account of sex, to violate the equal protection guarantee.

The policy in the case at bar countenances exactly such a sex-stereotyped approach to economic rights as those condemned in *Wiesenfeld* and in *Frontiero, supra.* Petitioners assume that the father needs and deserves a day off with pay when his wife is in childbirth, while they assume that the mother (who may have earned accumulated sick leave that she expects to draw when disabled) should derive economic protection during pregnancy, not from her own earning power and employment status, but from that of her "breadwinner" husband.

Not only do petitioners' compensation schemes relative to pregnancy discriminate in purpose; the adverse effects of these schemes upon pregnant female workers are obvious. While men and women alike supposedly earn ten (10) days of sick leave pay per year of service (Petition for Certiorari, App. D, pp. 53-54) this accumulated pay is withheld from

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[6]Respondent submits that there is no such ambiguity in Title VII's prohibition against sex-based discrimination in the case at bar. Petitioners' dualistic classification of women as "disabled" for purposes of imposing burdens upon them and as "not disabled" for purposes of denying benefits to them unqualifiedly deprives these women of equal employment opportunity on account of sex. 42 U.S. Code § 2000e-2(a)(1).

women whose sick days are attributable to pregnancy (A. 8, 88).

Petitioners assert to this Court that:

> "[a]*rguably*, the entitlement to paid leave for illness or injury provided at the time of this action did not include pregnancy insofar as pregnancy is a natural condition and not an illness or injury. (Thebault affidavit, A. 56."
>
> (Brief for Petitioners, p. 43) (emphasis added).

Petitioners next admit that if their denial of sick pay "was a pretext for gender-based discrimination, or [if] it resulted in gender-based effects . . .", that denial violates Title VII. (Brief for Petitioners, p. 43).

Respondent contends that the record in the case at bar, as detailed hereinabove, displays a *prima facie* showing that petitioners' denial of accumulated sick pay was part-and-parcel of a continuing and overt scheme of sex-based discrimination against pregnant women by petitioners, which included sex-stereotyped compulsory leave, examination and return policies developed for and applied to pregnant women *only*, payments to "expectant" fathers, and an anomalous and undefended refusal to compensate in the event of periods of actual disability of pregnant women by affording accumulated sick pay benefits.

Petitioners failed to meet their Title VII burden of making a showing of a legitimate, nondiscrimi-

natory reason explaining this oppressive and economically damaging scheme of treatment of Mrs. Berg and other pregnant employees. *McDonnell Douglas v. Green*, 411 U.S. 792, 802. Unlike the employer in *General Electric Co. v. Gilbert, supra*, petitioners did not even attempt to show that the payment of accumulated sick days for illnesses or injuries caused by pregnancy would impose any additional cost upon the School District. Nor did petitioners seek to demonstrate that, despite the sex-discriminatory economics of their refusal to pay for pregnancy-related sick days, the values of sick pay benefits actually received by their employees do not vary significantly on account of sex. Instead, petitioners elected not to offer *any* reason whatsoever for this policy at the summary judgment stage.

In the quite similar case of *Bravo v. Board of Education of the City of Chicago*, 345 F.Supp. 155 (N.D. Ill. 1972), the employer's complete failure to offer any reason or account for its refusal to compensate for pregnancy-related sick days caused the District Court to rule in favor of the employee's equal protection based claim for preliminary injunctive relief. In *Bravo, supra*, the District Court observed in pertinent part:

> "[t]eachers on illness leave are allowed to draw pay for their accrued sick pay days; pregnant teachers are not . . . The Board has offered no reason for these differences in benefits between teachers who are ill and those who are pregnant. Plaintiff has met her burden of showing a reasonable probability of success on her claim

> that there is no rational and substantial basis for the Board's distinction between pregnancy and other medical conditions for the purposes of determining employment benefits."
>
> 345 F.Supp. at 159.

In the case at bar, petitioners offered no rational and substantial basis for this policy at any stage of the proceedings below. On summary judgment, instead, petitioners baldly and insupportably asserted the presence of a triable issue of material fact as to whether Mrs. Berg was damaged by their policy. (A. 106). Respondent submits that, in accordance with this Court's identification of the Title VII burden of proof upon the employer, once a *prima facie* showing is made, in *McDonnell Douglas Corp. v. Green, supra,* 411 U.S. at 802, petitioners wholly failed to present any defense, whether cognizable under Title VII or otherwise, for their blanket unwritten policy refusing payment of accumulated sick leave compensation for days of actual illness related to or caused by pregnancy. As a result, respondent submits that the determination of the Court of Appeals upon this issue deserves affirmance by this Court.

CONCLUSION

Petitioners School District, Board and Superintendent have taken the position throughout this litigation that they freely could discriminate against pregnant women without becoming liable for discrimination on account of sex under Title VII. Accordingly, they persisted in the design and enforcement

of a series of policies that invidiously discriminated against respondent and other female employees similarly situated. Respondent respectfully contends that, upon the factual record presented to this Court, showing the recalcitrant and undefended manipulation by petitioners of statutory rights to equal employment opportunity held by female employees, this Court should conclude that the pregnancy-related policies of petitioners violated Title VII of the U.S. Civil Rights Act of 1964, as amended in 1972. For the reasons presented hereinabove, respondent urges that this Court affirm the judgment of the Court of Appeals for the Ninth Circuit, determining that petitioners' policies, compelling leaves for pregnancy at times and under conditions selected solely by petitioners, and depriving pregnant employees of earned sick pay benefits for days of actual disability due to pregnancy, constitute intentional discrimination on account of sex, in violation of 42 U.S. Code §2000e-2(a)(1) and (2), for which the judgment entered by the District Court in this action provides appropriate relief.

Dated, April 6, 1977.

Respectfully submitted,

MARY C. DUNLAP,
EQUAL RIGHTS ADVOCATES, INC.,
Attorneys for Respondent.

(With grateful appreciation for the assistance of Wendy Carson, Julia Jaurigui, and Roberta Spivek in the preparation of this Brief for Respondent.)